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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91177807
Party	Plaintiff 7-Eleven, Inc.
Correspondence Address	Charles R. Mandly, Jr. Foley & Lardner LLP 321 North Clark Street Chicago, IL 60610 UNITED STATES cmandly@foley.com, cfochler@foley.com, ptomailchicago@Foley.com, dcopland@foley.com
Submission	Other Motions/Papers
Filer's Name	David A. Copland
Filer's e-mail	dcopland@foley.com, cmandly@foley.com, jolsen@foley.com, PTOMailChicago@foley.com
Signature	/David A. Copland/
Date	06/09/2008
Attachments	Opposer's Reply to Applicant's Response 6908.pdf (15 pages)(260624 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

7-ELEVEN, INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91177807
)	
SUSAN B. BUCENELL,)	
)	
Applicant.)	

**OPPOSER'S REPLY TO APPLICANT'S RESPONSE TO OPPOSER'S MOTION TO
COMPEL APPLICANT'S RESPONSES TO DISCOVERY**

STATEMENT

Opposer, 7-Eleven, Inc. ("7-Eleven"), submits this reply memorandum in response to the opposition submitted by applicant, Susan B. Bucenell ("Applicant"). 7-Eleven requests that the Board exercise its discretionary authority and accept this reply brief because 7-Eleven believes that it will clarify the matters still at issue respecting the subject motion. *See TBMP* § 502.02(b) (2d ed. June 2003).

I. APPLICANT'S SALES OF GOODS UNDER THE MARK

Contrary to Applicant's assertion that she has complied with Interrogatory No. 4, Applicant has still not provided any information regarding the number of product units she has sold, nor has Applicant provided up to date sales information.¹ On May 19, 2008, 7-Eleven's counsel received a letter from Applicant which stated, in part, "total sales for year ending 2007 were \$456.00". *See* Second Declaration of David A. Copland in Support of 7-Eleven's Motion

¹ 7-Eleven requested, via its Interrogatory No. 4 and Document Request No. 5, information and documents regarding the annual sales, in units and dollars, of each branded product identified by Applicant in response to Interrogatory No. 1. *See* Declaration of David A. Copland in Support of 7-Eleven's Motion for an Order to Compel (filed previously with 7-Eleven's motion on May 5, 2008) (*hereinafter* "May 5 Copland Decl."), Exhs. A & B.

for an Order to Compel Applicant's Answers to Discovery (*hereinafter* "Second Copland Decl."), ¶ 2, Exh. L at 1. Further, Applicant's response omits any data regarding sales subsequent to January 1, 2008.

Applicant stated in her supplemental response of May 2008 that no documents exist which are responsive to Document Request No. 5. Second Copland Decl., ¶ 2, Exh. L at 1 – 2. The request sought "Documents sufficient to show applicant's annual sales, in units and dollars, of each branded product to be identified in response to Interrogatory No. 1 served concurrently herewith." May 5 Copland Decl., ¶ 3, Exh. B at 8. On its face, it does not appear credible that Applicant can have no documents (e.g., state and federal tax filings) evidencing her gross sales.

Applicant should be compelled to provide complete information regarding her sales of the HEALTHY GULP products.

II. THIRD PARTY NAMES AND MARKS

Because Applicant has raised such use as a defense to her own conduct, 7-Eleven sought information from Applicant through Interrogatory No. 18 and Document Request No. 26 regarding each third party product known to Applicant to be sold or distributed in the United States under a name or mark composed, in whole or in part, of the term "gulp". May 5 Copland Decl., Exh. A at 11 & Exh. B at 13. Applicant still has not fully responded to Interrogatory No. 18, though 7-Eleven acknowledges that Applicant's May 2008 supplemental response to Document Request No. 26 wherein she provided one document and a statement that no others exist is on its face a complete response to Document Request No. 26. As to Interrogatory No. 18, Applicant provided a simple list of what purport to be third party "gulp" marks, but stated in her May 2008 supplemental response that she does not have information available regarding the annual volume of such third party products distributed or the respective geographic territories.

Second Copland Decl., ¶ 2, Exh. L at 3. However, Interrogatory No. 18 requests both the identities of the person manufacturing or distributing the subject goods, as well as identification of the specific goods being offered. Applicant has provided neither, nor stated she does not have such information. Applicant should be compelled to fully answer Interrogatory No. 18 to the full extent of the information available to her.

III. OPPOSER'S COMPLIANCE WITH TRADEMARK RULE 2.120(e)

7-Eleven has complied with the Trademark Rules of Practice requirement that prior to bringing a motion to compel, the moving party make a good faith effort, by conference or correspondence, to resolve with the other party the issues presented in the motion. Rule 2.120(e). Applicant suggests in her response to the instant motion that 7-Eleven did not make a good faith effort to resolve outstanding issues.

7-Eleven notes that subsequent to receipt of the Applicant's first discovery responses, 7-Eleven sent Applicant a detailed letter regarding deficiencies in the responses. May 5 Copland Decl., ¶ 7. 7-Eleven's counsel then telephoned Applicant and sought to discuss the contents of the letter. At that time, Applicant terminated the telephone conversation before the parties had an opportunity to discuss all matters outlined in the letter. Applicant indicated during the conversation that she recognized she needed expert counsel and would seek to engage counsel. May 5 Copland Decl., ¶ 8; *see also* Consent Motion to Extend Discovery of Dec. 10, 2007 at 2.

Subsequent to the parties' telephone conversation 7-Eleven sent a reminder to Applicant concerning the supplemental responses requested in 7-Eleven's earlier letter. May 5 Copland Decl., ¶ 10. Applicant then served her own set of discovery requests on 7-Eleven, and her supplemental responses were not forthcoming for a further three weeks. May 5 Copland Decl.,

¶¶ 12 & 13. Applicant's supplemental responses were still deficient, and 7-Eleven subsequently filed the present motion to compel.

7-Eleven's detailed letter and telephone call to Applicant were good faith efforts to resolve the parties' differences and satisfy Rule 2.120(e). Applicant said the issues involved in responding to discovery were beyond her experience and she would engage suitable counsel. Instead, she proceeded *pro se*, took time to draft discovery requests to 7-Eleven even before she addressed 7-Eleven's outstanding, already-extended discovery requests to her, and then submitted two sets of supplemental responses that still do not address all the deficiencies raised in 7-Eleven's original letter.

CONCLUSION

For the foregoing reasons, as well as those set forth in its opening papers, 7-Eleven respectfully requests that the Board grant its Motion to Compel Applicant's Responses to Discovery.

Respectfully submitted,

FOLEY & LARDNER LLP

/David A. Copland/

Date: June 9, 2008

Craig S. Fochler
Charles R. Mandly, Jr.
David A. Copland
321 North Clark Street, 29th Floor
Chicago, Illinois 60610

Attorneys for Opposer,
7-Eleven, Inc.

CERTIFICATE OF SERVICE

I, David A. Copland, counsel for 7-Eleven, hereby certifies that a copy of OPPOSER'S
REPLY TO APPLICANT'S RESPONSE TO OPPOSER'S MOTION TO COMPEL
APPLICANT'S RESPONSES TO DISCOVERY was served on this 9th day of June, 2008 via
first class mail, postage prepaid, upon Applicant at:

Ms. Susan B. Bucenell
30623 Bittsbury Ct.
Wesley Chapel, FL 33543-3921

/David A. Copland/

David A. Copland

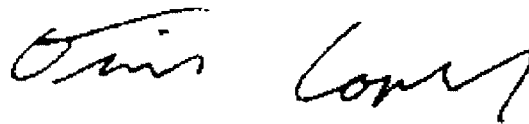
**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

7-ELEVEN, INC.,)	
)	
Opposer,)	
)	
v.)	Opposition No. 91177807
)	
SUSAN B. BUCENELL,)	
)	
Applicant.)	

**SECOND DECLARATION OF DAVID A. COPLAND IN SUPPORT OF
OPPOSER'S MOTION FOR AN ORDER TO COMPEL APPLICANT'S
ANSWERS TO DISCOVERY**

I, David A. Copland, hereby declare as follows:

1. I am an attorney with the firm Foley & Lardner LLP in Chicago, Illinois, attorneys for opposer 7-Eleven, Inc. The testimony set forth below is made of my personal knowledge.
2. A true and correct copy of correspondence dated May 19, 2008 and received by 7-Eleven's counsel is attached hereto as Exhibit L.



Date: June 3, 2008

David A. Copland

EXHIBIT L

May 19, 2008

Foley & Lardner LLP
Mr. David A. Copland
321 North Clark Street
Suite 2800
Chicago, IL 60610-4764

Re: HEALTHY GULP
Application Serial No. 78/916,143

Dear Mr. Copland,

I am in receipt of your DECLARATION OF DAVID A. COPLAND IN SUPPORT OF OPPOSER'S MOTION FOR AN ORDER TO COMPEL, OPPOSER'S MOTION FOR AN ORDER TO COMPEL APPLICANT'S RESPONSES TO DISCOVERY, and OPPOSER'S MEMORANDUM OF LAW AND FACT IN SUPPORT OF IT'S MOTION, filed with the Board on behalf of 7-Eleven, the Opposer.

I was surprised by these Motions, as I was not aware that I had not complied with your requests for discovery. Your request for supplementation of my discovery responses were provided in my letter dated January 9, 2008. (Attachment A).

There seems to be three areas you feel as though I have not complied with your discovery requests: Healthy Gulp sales data, the geographical area that Healthy Gulp is sold and marketed, and detailed information and documents of third party uses of the term "gulp".

HEALTHY GULP SALES DATA (Int. No. 4 & Req. No. 5)

Regarding Healthy Gulp's sales data, I direct your attention to #5 in Attachment A. I stated, "The response provided specifically stated that product sales did not commence until the 4th quarter of 2007 and the end of the quarter sales report is not yet complete. Please state the relevance of this information to this matter and sales information will be provided when available, if relevant."

I was waiting on your response as to its relevance. And since I had not received any response, I did not provide them. Nevertheless, subject to, and without waiver of the foregoing objection to its relevance, Healthy Gulp's total sales for year ending 2007 were \$456.00. This figure does not include marketing and promotional product give-aways.

These sales were a combination of internet sales generated from Healthy Gulp's website, sales prompted by a previous free sample of Healthy Gulp, or word of mouth sales through others who had seen or heard of Healthy Gulp.

As for documents regarding these sales and where they were made, most were cash sales and no

records exist. The geographical territory in which these sales were made and sent to is discussed in the next section.

GEOGRAPHIC TERRITORY OF MARKETING, SALES, DISTRIBUTION (Req. No. 7)

As previously stated in Interrogatory responses and in my letter dated January 9th, 2008, Healthy Gulp is marketed worldwide via the World Wide Web at www.healthygulp.com. Healthy Gulp is sold and distributed via this website. Healthy Gulp has also been sold, marketed and distributed locally (Applicants geographical area) and nationally, as cash sales and promotional free samples. I have detailed these events in previous responses and have provided all documents responsive to this request.

I again direct your attention to Attachment A. Postal receipts which detailed exactly where each Healthy Gulp shipment was sent. This included the town, state and zip code of each order and/or free sample. Therefore, I have provided very specific information regarding where sales have been made and where products were shipped to include sales as well as promotional samples.

Further, I provided details and documents regarding other promotional events in which Healthy Gulp was a participant. Yet in your motion you indicate that "Bucenell also referenced a fund raising event related to an organization with the word "Atlanta" in its name, but provided no clear information regarding where the event was or how the mark was used in association with the mark"

My apologies, Atlanta is in the State of Georgia. And to be clear, my response indicated that this particular event you made reference to was Paws for Cocktails, a benefit for the Atlanta Pet Rescue and that Healthy Gulp was given away free of charge. Additionally, a copy of the invitation was provided to you that does provide the exact address for the Paws For Cocktails Fund Raiser Event. It was at the Park Tavern, Piedmont Park, at the corner of 10th and Monroe, in Atlanta. (In the State of Georgia)

Moreover, if you review the copies of the e-mails that were provided with my letter, regarding this event, it is clear how Healthy Gulp was used in association with this event-as door prizes and giveaways.

Regarding the contest at QVC, you indicated that "Bucenell...but has provided no clear information regarding where the contest was or how the mark was used in association with the contest." On the contrary, you were provided with a copy of the Product Search Event Confirmation email. In it you will notice that Oprah's Search for the Next Big Idea was at the QVC Studio Park, 1200 Wilson Drive, West Chester, PA., 19380. Healthy Gulp was one of hundreds of products selected to be displayed and evaluated for Oprah's/QVC Contest entitled "The Next Big Idea".

In view of the foregoing, I believe that I have complied with your discovery requests, and have no further documents responsive to Req. No 7, other than those already provided. Perhaps you should review the documents in their entirety prior to advising the Board that Healthy Gulp has

not complied.

KNOWLEDGE OF THIRD PARTY "GULP" PRODUCTS (Int. No. 18 & Req. No. 26)

In your motion you indicate that "Bucenell has offered no legitimate grounds for her failure to comply with 7-Eleven's discovery requests." I did not know I had not complied. In fact, in two previous responses, Applicants Responses to Opposer's Interrogatories and again in my letter (Attachment A) dated January 9, 2008 supplementing my discovery responses I provided responses to both Int. No. 18 and Req. No. 26. Regarding Req. No. 26, I indicated that the only documents that I had relating to this request were those relating to 7-Eleven vs. Wechsler. They were and still are the only documents that I have relating to Req. No. 26.

Regarding Int. No. 18, I provided the names of 22 products which I was aware of that had used the word "gulp". These are third party products and companies and I am not privy to the annual volume of products distributed and the geographic territory in which they are distributed.

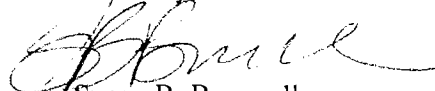
I became aware of these third party products that use the name "gulp" in their product name via internet research. A search conducted on the USPTO website of live trademark names using the key word "gulp" revealed numerous names, many of which belong to the Opposer, others do not. I also conducted a search on the internet using the "Google" search engine. I searched the key word "gulp" to find additional products using the word "Gulp" in their product name. This search netted over 5 million "hits". I then vetted out those "hits" that were products containing the word "gulp" in their name. I did this for approximately 15-20 pages of "hits" and then simply wrote the names on a piece of scrap paper. I have provided these names in my letter supplementing discovery requests.

Attached please find a copy of the piece of scrap paper that I used to write these names on. (Attachment B) I do not have any other documents relative to this request. Moreover, this information is equally available to the Opposer by conducting the same simple internet searches.

However, in your Motion to Compel you indicate that "Opposer finds it surprising that applicant has identified 21 other names or marks yet has no documents related to the same." The Applicant finds it surprising that the Opposer is not aware of these products and has not done these same simple searches. The applicant also finds it offensive that you would insinuate that I have these documents and willfully ignored a judicial request for them.

As you can see, I had no reason to believe that I had not complied with your discovery requests. In view of the foregoing clarifications, please advise if you intend to withdraw your Motion to Compel.

Sincerely,



Susan B. Bucenell
Healthy Gulp

#HuchmentA

January 9, 2008

Foley & Lardner LLP
321 North Clark Street
Suite 2800
Chicago, IL 60610-4764

Re: HEALTHY GULP
Application Serial No. 78/916,143

Dear Mr. Copeland,

This letter is in response to your request for a supplementation of my discovery responses.

Document Requests

2. Although the response is clear in that it states "all" labeling, your inquiry is confirmed.
3. The promotional materials provided comprise all materials that have been used. Please see the enclosed materials that have been created but not used.
4. This request is somewhat vague in that "use" is not defined. However, the Healthy Gulp mark was first "used" in July 2005 during the product concept and development phase. Please see draft logos previously provided with Applicant's original response to Opposer's discovery requests. The only other document available from this phase is an invoice from a graphic artist dated April 26, 2006 who designed a logo for Healthy Gulp that was not used, a copy of which is attached. Applicant has no other documentation available responsive to this request due to a hard drive crash of her computer in early 2007.
5. The response provided specifically stated that product sales did not commence until the 4th quarter of 2007 and the end of quarter sales report is not yet complete. Please state the relevance of this information to this matter and sales information will be provided when available, if relevant.
7. As previously stated in Interrogatory responses, Healthy Gulp is marketed worldwide via the World Wide Web at Healthygulp.com. Please feel free to print the pages off of the website at your convenience. Healthy Gulp has been given free of charge to adoptive parents of DARE (Dachshund Adoption, Rescue and Education) dogs

and at the Paws For Cocktails benefit for the Atlanta Pet Rescue on November 29, 2007. Healthy Gulp was an official sponsor of the 2007 Stampede in Wesley Chapel, Florida and samples of Healthy Gulp were given away at the event. Healthy Gulp was also showcased at the annual "Next Best Idea" contest at QVC in 2006, however, was not selected. There are no documents available from DARE responsive to this request. Copies of e-mails relative to the Paws benefit, 2007 Stampede and the QVC contest are attached hereto. Some documents relative to these events were lost due to a hard drive crash of Applicant's computer in early 2007. Healthy Gulp has been mailed throughout the country to friends and family. If necessary, a mailing list will be provided with names redacted.

8. Applicant has not paid for advertising to date. Applicant has incurred expenses for postage and free product samples; see copies of attached invoices for same.

10. There are no documents responsive to this request. The selection process for the name Healthy Gulp was one of personal brainstorming.

13. See attached contract with graphic artist, limited e-mails between Applicant and her graphic artist, e-mails between Applicant and her label company and invoice from label company. Some documents relative to these events were lost due to a hard drive crash of Applicant's computer in early 2007.

17. There are no documents responsive to this request.

18. This request is not limited to experts who will be called to testify in this matter and, therefore, seeks non-discoverable documents. However, to the extent that this request is limited to experts who will be called to testify in this matter, Applicant will supplement her response, if and when appropriate.

20. There are no additional documents responsive to this request other than those previously provided with Applicant's discovery responses. Earlier versions of the creation and design of the Healthy Gulp mark are not available due to a hard drive crash of Applicant's computer in early 2007. Applicant is providing an invoice from a graphic artist as referenced in number four above.

21. Although the response is clear in that it states "all responsive documents," your inquiry is confirmed.

25. Applicant will not stipulate that third party uses of names or marks composed in whole or in part of the term "gulp" are not relevant to this proceeding. Applicant further notes that the wording of Interrogatory No. 15, which is referenced in document request no. 25, is vague and unclear. The only documents in Applicant's possession at this time responsive to this request are filings in the matter of 7-Eleven, Inc. v. Gulp, copies of which are already in 7-Eleven, Inc.'s possession as it was the

Opposer.

26. You are correct that Applicant's response should have referred to Interrogatory No. 18. Again, Applicant will not stipulate as proposed in your letter. See response to request no. 25 above.

27. The draft logos are those not used on the Healthy Gulp samples provided. There are no additional documents available responsive to this request due to a hard drive crash of Applicant's computer in early 2007.

Interrogatories

1. The ordinary commercial name for the Healthy Gulp product is bottled water for cats and dogs, vitamin water for cats and dogs, bottled water for pets, and mineral and flavor enhanced bottled water for cats and dogs.

2. Healthy Gulp has been used as a mark for bottled water for cats and dogs. It has never been used in a different manner. However, the Healthy Gulp logo has been used on marketing products including water bowls, frisbees and t-shirts (a sample water bowl and frisbee have previously been provided with Applicant's original responses to Opposer's discovery requests).

4. Please see document request no. five above.

5. Please see number document request no. four above. In addition to Susan B. Bucenell, Monica Cevallos of Sniff Design and Marc Miller, Murray Label & Printing participated in the design of marketing and promotional materials for Healthy Gulp.

6. Please see document request no. 10 above. Susan B. Bucenell is the only individual responsible for Applicant's selection, adoption and use of the name Healthy Gulp. The only individuals with knowledge of Applicant's selection of the name Healthy Gulp are her friends and family.

7(a). Healthy Gulp has never been assigned from one party to another.

8. Please see document request no. eight above.

12. Applicant had heard the name "Big Gulp" from frequenting 7-Eleven years earlier. Applicant became aware of other marks which used the word "gulp" or a form thereof, including Opposer's use of the "GULP" marks, in connection with her research for the Healthy Gulp mark.

15. Applicant will not stipulate as proposed in your letter. Applicant is aware of the action filed by 7-Eleven in the matter of 7-Eleven, Inc. v. Gulpy.

16. See response to Interrogatory no. five above.

18. Applicant will not stipulate as proposed in your letter. Applicant is aware of the following products which use the term "gulp": gulpy, gulp!, GULP, MaxiGulp, Gulp! Alive, Saltwater Gulp!, The Gulps!, Gulp!, Gulp Hydration Pack, Big Gulp Hydration Pack, Double Gulp Hydration Pack, Gulp Design, Gulp Beer Fountain, Gulp! Wine Newsletter, B. Gulp-it, Gulp Promotion, Cytomax Gulp 'N Go, Gulp!, The Gulp Stopper, The Garelli Gulp, Grip N Gulp, and Google Gulp!

19. ~~Prior to her application for a trademark, Applicant was using the Healthy Gulp mark for product conception, development and to formulate a logo.~~

I trust you will find these responses adequate. Thank you for your cooperation in this regard.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Bucenell", written in a cursive style.

Susan B. Bucenell
Healthy Gulp

Berkley Fishing Baits

Gulp! Alive
Gulp!
Saltwater Gulp!

The Gulps
by Rosemary Wells
a book.

Gulp! - Gabriella Goddard
- author -

Gulp Hydration Pack
by Irish Sierra, Double Gulp,
Big Gulp

Gulp design

Gulp beer fountain
Gulp! - wine newsletter

B. Gulp-it

Gulp Promotion

Cytomax
Gulp 'N GO - official gel

www.robbinsinternational
Nalgene
Grip N Gulp Kids

Garelli 1969
Gulp.
www.cybermotorcycle.com

www.whitelightdesigns.
com

line of 7 eleven drinks in
a bottle

Big Gulp Precision Products

The Gulp Stopper
- a dog dish
a doggie dog.com

Gulp! -

The unspillable vase